No. 12000

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY LYNN DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED STATES OF AMERICA,

Appellees.

APPELLANTS' BRIEF

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS OF JURISDICTION IN THE DISTRICT COURT AND JURISDICTION OF CIRCUIT COURT OF APPEALS TO REVIEW THE JUDGMENT

This is a cause on appeal from the District Court of the United States for the District of Oregon. It is a cause in the nature of a suit for declaratory judgment to determine the beneficiary of a policy of National Service Life Insurance upon the life of Lieutenant Perry Lynn

Downing, Jr., a member of the Air Corps of the United States Army, who was killed on October 3, 1945.

The District Court had exclusive jurisdiction to determine the issue by virtue of Act of June 7, 1924, c. 320, Sec. 19, 43 Stat. 612, 38 U.S.C.A., S. 445, as amended by Sec. 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014, Act of July 11, 1942, c. 504, Sec. 6, 56 Stat. 659, 38 U.S.C.A., S. 817. This Court has jurisdiction to review that judgment by virtue of 28 U.S.C.A. Sec. 225.

The pleadings showing the existence of jurisdiction are the Complaint, Tr. 2 to 5; Answer of the United States of America, Tr. 8 to 11; and Answer of the defendants Gertrude I. Downing and Perry Lynn Downing, Tr. 5 to 8.

STATEMENT OF THE CASE

Lieutenant Downing became a member of the Armed Service on or about December 9, 1942 (Tr. 13). Thereafter and on April 18, 1943 (Exhibit 6), he applied for and received a $10,000 National Service life insurance certificate. At that time Lieutenant Downing was unmarried and named his mother, Gertrude I. Downing, as beneficiary, and his father, Perry Lynn Downing, Sr., as contingent beneficiary (appellants). Thereafter and on the 4th day of September, 1943, the Lieutenant married Dorothy Downing, one of the appellees. A child was thereafter born on the 20th day of June, 1945 (Tr. 22). On December 28, 1944, Lieutenant Downing executed

a document (Exhibit 4) referred to as a Personal Affairs Statement. It appears that the periodic execution of a Personal Affairs Statement is a requirement of all flying officers. This statement purports to be a confidential statement showing the consolidation of all personal affairs actions claimed to have been taken by the soldier. It contains the information that the soldier had obtained a $10,000 war risk policy, and that the beneficiary thereof was the appellee, his wife, Dorothy A. Downing.

Based on the said Exhibit 4 and purported statements made by the deceased Lieutenant, the appellee claims that a change of beneficiary was accomplished. The Veterans Administration denied the appellee's claim of change of beneficiary, and an appeal was taken to the Board of Veterans Appeals, and her claim was again denied, Exhibit 17.

Thereafter, this suit was commenced, seeking adjudication that a change of beneficiary had been made in her favor, the court sustained the complaint and the appellants now appeal. The question, therefore, is whether or not a valid change of beneficiary has been made in the soldier's life insurance policy. The issue is joined by the allegations in the complaint of a valid change and a denial thereof by the United States of America and the appellants.

SPECIFICATIONS OF ERROR

The appellants allege error committed by the lower court as follows:

1. The Court erred in holding that Exhibit 4 (Personal Affairs Statement) and statements made by the deceased constituted a change of beneficiary.

2. The court erred in finding that after the marriage of Perry Lynn Downing, Jr., he executed a change of beneficiary of his National Service life insurance and designated Dorothy Downing, the appellee, as the principal beneficiary, and that the document was inadvertently lost while it was in the possession of the United States Army.

SUMMARY OF ARGUMENT

The appellants' contentions are that the beneficiary of the National Service Life Insurance Policy of Lieutenant Perry Lynn Downing, Jr., has never been changed from his mother and father to Dorothy Downing, the appellee. We maintain that neither the execution of the personal affairs statement nor alleged statements made by the decedent as to his change of beneficiary are sufficient to constitute a valid change of beneficiary.

FIRST SPECIFICATION OF ERROR

The Court erred in holding that Exhibit 4 (Personal Affairs Statement) and statements made by the deceased constituted a change of beneficiary.

ARGUMENT

It is admitted by the respondent that the original beneficiary of the deceased's life insurance policy were the appellants, his mother and father (Tr. 3). They contend that this beneficiary was changed by the decedent having executed a personal affairs statement stating that he had a National Service Life Insurance policy with his wife, the appellee, as beneficiary. This exact situation arose in the case of *Bradley vs. United States,* 10 Cir., 143 F. 2d 573, Certiorari denied, 323 U.S. 793, 65 S. Ct. 429, 89 L Ed. 632, wherein the soldier named his mother as beneficiary, thereafter married and thereafter filled out a personal affairs statement showing his wife as beneficiary. The court, holding in that case that there was no change of beneficiary, said:

> "The expressed intention of the insured to change the beneficiary, standing alone and unaccompanied by some affirmative act, having for its purpose the effectuation of his intention, is insufficient to effect a change of beneficiary and the courts cannot act when he has not first attempted to act for himself. . . . There is nothing in the confidential report or the evidence of this case from which it can be legitimately inferred that it was intended for the use and information of the Veterans Administration, or that its purpose was to effect a change of beneficiary under the life insurance policy. . . . It is not a notice of any kind, is not a direction that the name of the beneficiary be changed, and does not express or indicate even directly or inaptly a desire to have the beneficiary changed. Indeed, it is not a voluntary expression of any wish, desire or intention. . . . When given its most liberal construction in the light of all the facts and circumstances, we are convinced that

it cannot be treated as an effectuation of the insured's intention to change his beneficiary."

There are other cases in the Circuit Court of Appeals which hold that changes of beneficiary had been made without the necessity of literally complying with the provisions and regulations of the Veterans Administration. *Shapiro vs. United States,* 166 F. 2d No. 2 P. 240; *Collins vs. United States,* 10 Cir. 161 F. 2d 64, Certiorari denied, 331 U.S. 859, 67 S. Ct. 1756; *Roberts vs. United States,* 4 Cir. 157 F 2d 906, Certiorari denied, 330 U.S. 829. However, in each of these cases a substantial compliance with the regulations were found.

We maintain, and it has never been contradicted, that National Service Life Insurance policies stand upon the same legal basis as any other life insurance policy, and, therefore, the rules and regulations as to a change of beneficiary must be followed in order to constitute a valid change. The Act of Congress in creating National Service Life Insurance granted to the Veterans Administration the right to promulgate rules and regulations for the administration of the said act. Thereafter, the Veterans Administration formulated the following requirement for change of beneficiary:

"The change of beneficiary to be effective must be made by notice in writing signed by the assured and forwarded to the Veterans Administration by the insured or his agent and must contain sufficient information to identify the assured wherever practical. Such notice shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration a valid designation or

change of beneficiary shall be deemed to be effective as of the date of execution." (Regulations of the Veterans Administration, 7 Fed. Reg. 8363 S. 10.-3447, Oct. 16, 1942.)

With reference to the foregoing regulation, the Court in the Bradley case said:

"The manifest purpose of the foregoing regulation is to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance and to protect the insurer against conflicting claims for the proceeds of the policy."

There is no contention made by the appellee that there was any affirmative act by this deceased which would fulfill the requirements of the aforementioned regulation. Their only claim seems to be that his act in executing the personal affairs statement would have that effect. However, that statement contains the following instructions:

"Instructions: AAF Personal Affairs Statement is not to be used, either as a substitute for, or in lieu of authorized forms or established procedures for effecting desired personal affairs actions. The purpose of this form is to provide a consolidated record of all personal affairs actions taken by previous accomplishment of official forms. Accordingly, prior to signing this statement, any action will be accomplished in the prescribed official manner."

There was nothing in this statement of affairs which could be said to effect a change of beneficiary nor could it be said that the deceased was misled by the form used as was the case in *Shapiro vs. United States,* 166 F. 2d

No. 2 P. 240, wherein the soldier executed a document entitled "Designation of Beneficiary." It appears in that case that the soldier understood that this "Designation of Beneficiary" had reference to his insurance policy, whereas in truth the form was intended for a designation of beneficiary for his gratuity pay. The court expressly held in that case that the soldier, Shapiro, as well as his Commanding Officer understood that this form was the proper one for use with his life insurance policy.

The courts are unanimous in holding that in order to effectuate a change of beneficiary there must be (1) an intent; (2) an affirmative act to change the beneficiary. The appellants have introduced evidence (Exhibits 9 to 13) showing that the soldier was having marital difficulties and had had such difficulties practically ever since the marriage. The exhibits (18) show that the soldier was planning on a divorce and had already made plans to have his father take the family automobile from the possession of the appellee. His further act in sending most of his personal effects to his parents rather than his wife show that it was not his intention to remain with his wife. This intention is also borne out by his statements that he wanted to remain in the Armed Services. How then can the appellee claim there was any intention to change the beneficiary?

The appellee has attempted to bolster her claim of change of beneficiary by certain alleged statements made by the deceased to a brother officer to the effect that he had made such a change. She has produced Glen Bauman who claims to have been at Chico, California, with

the deceased in April of 1945, and that the deceased had made statements to him that he was going to change the beneficiary. Mr. Bauman says:

"A. Well, it happened right after our leave up here in April of 1945. We had gone back—We had flew back from here—and we were prepared to go overseas; we were alerted at the time, and he had told me that he was going to change his beneficiary —change his insurance. I had known at the time that his mother was beneficiary before that, and both of us went in at the same time to change.

* * * * *

A. We went in and, as far as I know, he filled it out. I didn't pry into his affairs. I didn't think it was any of my business, but he had told me after we came out that he had everything straightened out as far as his insurance was concerned. I didn't ask him whether it was to his wife or whether it was to his mother, but I took it it was for his mother —I mean, for his wife, rather.

Q. At that time did you fill out a Personal Affairs Statement?

A. Yes, sir, I did.

Q. You went to Headquarters. Was that the place that soldiers would go to make a change of insurance beneficiary?

A. That is the only place.

Q. Did he indicate to you beforehand to whom he was going to change his insurance?

A. No, he didn't say exactly, but he said he was going to change his beneficiary.

Q. Did he say afterwards, when he came out of Headquarters — What is your best recollection of what he did say?

A. Well, he said he had taken care of it. I pre-

sumed he had changed it because that is what he told me he went in—That is what he told me before we went in.

Q. Did he say anything further?

A. Not exactly that I remember of. That is about all that (36) was said." (Tr. Pp. 47 to 49).

If these alleged statements by the deceased are true, having been made in April or May, 1945, it necessarily follows that the deceased's act in executing the Personal Affairs Statement of December 28, 1944, was never intended to be a change of beneficiary. The testimony of Bauman was only admissible for the purpose of either (1) showing the state of mind of the decedent, or (2) resolving an ambiguity of a written statement. (*Shapiro vs. United States* supra). Herein there was no ambiguity of any instrument nor was there any showing of the deceased's state of mind inasmuch as the alleged statements of the deceased did not show to whom he intended to make his beneficiary. It must be kept in mind that there was no waiver of the strict provisions of the regulations of the Veterans Administration of the United States as was the case in *Collins vs. United States,* supra. The Veterans Administration in all of its rulings and the United States of America in its answer herein all deny that there has been any valid change and all maintain that the beneficiaries are the appellants herein.

SECOND SPECIFICATION OF ERROR

The court erred in finding that after the marriage of Perry Lynn Downing, Jr., he executed a change of bene-

ficiary of his National Service Life Insurance and designated Dorothy Downing, the appellee, as the principal beneficiary, and that the document was inadvertently lost while it was in the possession of the United States Army.

ARGUMENT

The above quoted finding of the District Court appears in the findings of the said court (Tr. 14). The only basis we can see for such a finding is an inference based upon the execution of the personal affairs statement, but as stated heretofore under the First Specification of Error, the courts have already held that the execution of a personal affairs statement is not sufficient to constitute such a change.

As heretofore stated, the testimony of Glen Bauman in our opinion adds nothing to the evidence in this case but hearsay and was inadmissible for the purpose of proving a change of beneficiary. The case of *Collins vs. United States*, supra, affirms the *Bradley* case, supra, the court stating in the Collins case as follows:

> "It has been held without exception that a mere intent to change a beneficiary is not enough. Such an intent must be followed by positive action on the part of the assured evidencing the right to change the beneficiary. . . . In the Bradley case the insured soldier had taken no affirmative steps to bring about a change in beneficiary. He had written no letter requesting such a change, filed no application, nor had he done anything else. The only act relied upon to establish a change in beneficiary was a statement contained in a confidential report which was re-

quired of all flying officers, and the only purpose of which was to compile and maintain accurate personal records of all of the officers of the Air Corps. This report was addressed to the United States Army Air Corps. In the report the officer was asked the amount of government insurance and the beneficiary thereof. When he filled out this confidential report, he answered that he had $10,000 government insurance, and that Ann M. Bradley, his wife, was the beneficiary. As pointed out in the opinion, at most this statement did not even constitute an expression of a desire to have the beneficiary changed. At most it indicated a belief or understanding that his wife was the present beneficiary. The difference between those facts and the facts in this case are obvious upon a casual examination."

The appellee appears to take much comfort from the affidavit of Gertrude Downing, one of the appellants (Exhibit 2), dated October 21, 1946, wherein she states:

". . . That on or about the 25th day of July, 1945, I talked to my son Perry L. Downing, Jr., immediately prior to the time he was assigned to duty over seas, and asked him if he had arranged his personal affairs, that at said time he told he that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife, the said Dorothy A. Downing, that I do not desire to claim the proceeds of this policy as I believe that my son changed the beneficiary, named his said wife, and that the application made to the Veterans Administration for payment to me of the proceeds of said policy was made for the purpose of assigning said proceeds to the Dorothy A. Downing, and for no other purpose."

Here again we maintain that such evidence is inadmissible to prove a change of beneficiary and were admissible, if at all, only for the purpose of showing a

state of mind or intent. Furthermore, the instrument was executed in an unselfish attempt to give the proceeds herein to the appellee. In her testimony the affiant, Gertrude Downing, testified that her son had never told her that he had executed documents transferring his insurance to his wife, but that he told her that all of his affairs were in order. It is readily understandable that this affiant in her grief over the death of her son was not too careful in reading the affidavit prepared for her by the attorney for the appellee herein.

CONCLUSION

This is not a cause wherein the appellants are attempting to secure any of the proceeds of the life insurance for the benefit of themselves personally. The money heretofore received by the appellants from the insurance policy have been kept in a trust account (Tr. 62 and 63) which remains intact. The avowed purpose testified to by the appellants is to maintain that fund for the exclusive benefit of the decedent's child. We maintain that under the law and the equities of the cause, this case should be reversed.

Respectfully submitted,

FRANCIS F. YUNKER,
Attorney for Appellants.